

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH CAPOGRECO, et al.,

Plaintiffs,

No. CIV S-00-1951 LKK GGH P

VS.

R. SANDHAM, et al.,

Defendants.

ORDER

Plaintiffs, state prisoners proceeding pro se, seek relief pursuant to 42 U.S.C. § 1983.

1983. Pending before the court are two motions for partial summary judgment. These are defendants' previously vacated motions for partial summary judgment as to plaintiff Capogreco and for partial summary judgment as to his co-plaintiff Johnson, re-noticed by order filed on October 13, 2004. These motions were re-noticed as to defendants Sandham, Gilkes, Malan, Lett, Parks, Castro and Tristan. On October 21, 2004, defendant Maurino, in essence joining the motions, renewed and re-noticed her motions for partial summary judgment as to each plaintiff, pursuant to the court's orders filed on January 28, 2004 and October 13, 2004.¹ Therefore, all defendants have moved for partial summary judgment as to each plaintiff, seeking entry of

¹ Defendant Maurino's renewed notice had attached as Exhibit A, her responses to plaintiffs' first set of interrogatories, which had been served on August 5, 2003.

1 judgment in their favor and dismissal of the entire action.

2 Plaintiffs filed a joint (inapposite) opposition² to the previously vacated motions,
3 filed on July 17, 2003 and July 18, 2003, respectively, on August 1, 2003 and then, pursuant to
4 the order filed on October 1, 2003, filed another opposition, on December 4, 2003.³ On January
5 28, 2004, in vacating defendants' July 18, 2003 partial summary judgment motion as to
6 defendant Johnson, the court stated that the motion was vacated "without prejudice to its renewal
7 on the court's own motion, once there is a showing that plaintiff Johnson has been provided
8 access to his legal materials relevant to this case and access to the law library." See Order, filed
9 on January 28, 2004, p. 14.

10 Thereafter, in its October 13, 2004 order, the court noted that defendants had not
11 made the showing the undersigned had ordered that plaintiff Johnson had been provided access
12 as set forth above but stated that plaintiff Johnson had indicated that the court could proceed to
13 adjudicate the motion for partial summary judgment as to him based on his previously submitted
14 opposition.⁴ In the same order, plaintiff Capogreco's request for the court to take judicial notice
15 of the exhibits submitted in opposition to defendants' March 18, 2002 motion to dismiss, in
16 adjudicating defendants' motion for partial summary judgment as to him, was granted.

17 On November 17, 2004, plaintiffs filed their response to defendant Maurino's
18 motions. In their November 17, 2004, opposition, plaintiffs, who had appeared to have
19 acquiesced to proceeding to the adjudication of defendants' dispositive motions, objected that the
20 court would be proceeding without requiring defendants to make the showing set forth in the
21 January 28, 2004 order, that plaintiff Johnson had been provided the requisite access to the
22 relevant legal property and the law library. Plaintiffs, however, did not renew their claim that

23 ² See Order, filed on October 1, 2003.

24 ³ Plaintiffs were also granted an extension of time by order filed on November 7, 2003.

25 ⁴ Order, filed on October 13, 2004, p. 2, citing plaintiff Johnson's February 19, 2004
26 Objections to the January 28, 2004 Findings and Recommendations.

1 plaintiff Johnson had not actually obtained such access, in fact, with respect to law library access,
2 plaintiffs conceded that plaintiff Johnson had been allowed such access, albeit directly related to
3 another matter. Even though the court on its own motion re-noticed defendants' motions for
4 partial summary judgment in the October 13, 2004 order, at least in part on the ground that
5 plaintiffs had appeared to waive any further objection with respect to Johnson's access to his
6 legal property and law library access, it appears the issue has not been laid to rest. Indeed,
7 defendants have made no showing that plaintiff Johnson has been provided access to his own
8 relevant legal property, which, as noted, was a fact recognized in the court's October 13, 2004
9 order renewing and re-submitting defendants' partial summary judgment motions.

10 This unwieldy litigation has been proceeding at a snail's pace for too long, in
11 large part, because both defendants and plaintiffs continue to drag their heels in complying with
12 the letter of the court's orders. The undersigned has neither the time nor the resources to
13 adjudicate the pending motions, only to have objections raised based on any party's failure to
14 have complied with a prior court order. Nor will the court attempt to cobble together endlessly
15 plaintiffs' opposition/exhibits to the pending motions from various earlier filings, beyond what is
16 set forth herein. Therefore, defendants will be directed to show proof that plaintiff Johnson has
17 been allowed access to the relevant legal property in this matter, as well as law library access,
18 before the court will proceed on these motions, within 30 days. If defendants fail to make the
19 requisite showing, the court will vacate defendants' motion as to plaintiff Johnson and proceed
20 only to adjudicate the motion pertaining to plaintiff Capogreco. Moreover, if no adequate
21 showing is made, the motion for partial summary judgment as to defendant Johnson will be
22 permanently vacated, the matter proceeding to trial as to plaintiff Johnson.

23 If defendants make the requisite showing of access for Johnson, he will have 30
24 days thereafter to file his opposition and exhibits. If he does so, this will be the only opposition
25 (along with exhibits) that the court will review in opposition to defendants' motion for partial
26 summary adjudication as to Johnson. If defendants make the necessary showing and Johnson

1 nevertheless chooses to proceed only on the submitted opposition, the court will proceed upon
2 the same opposition as it will proceed on with respect to plaintiff Capogreco, filed on December
3 4, 2003, along with the exhibits plaintiffs submitted to accompany their May 4, 2002 opposition
4 to defendants' earlier motion to dismiss, which plaintiffs' requested the court to consider as well
5 in opposition to the summary judgment motions.

6 Accordingly, IT IS HEREBY ORDERED that:

7 1. Defendants are directed to show proof, within 30 days, that plaintiff Johnson
8 has been provided access to plaintiffs' legal property relevant to this matter and to the law
9 library;

10 2. Upon defendants' showing of proof of access, plaintiff Johnson must file his
11 opposition to the pending motion for partial summary judgment as to himself within 30 days,
12 along with any exhibits if he elects to proceed on a revised or amended opposition; if he does so,
13 the court will consider only the newly filed opposition with respect to defendants' motion as to
14 plaintiff Johnson;

15 3. Upon defendants' showing of proof of access, plaintiff Johnson may elect to
16 proceed on the previously submitted opposition and on the exhibits to plaintiffs' May 4, 2002
17 opposition to defendants' prior motion to dismiss, which constitute the opposition and exhibits
18 upon which plaintiff Capogreco rests;

19 4. Should defendants fail to make the requisite showing of proof of access, the
20 court will permanently vacate defendants' motion for partial summary adjudication as to plaintiff
21 Johnson, as a sanction.

22 DATED: 7/1/05

23 /s/ Gregory G. Hollows

24

 GREGORY G. HOLLOWWS
25 UNITED STATES MAGISTRATE JUDGE
26

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